LIBRARY
SUPREME COURT, U. S.

FILED
DEC 30 1971
E. ROBERT SEAVER, CLERK

IN THE

Supreme Court of the United States

October Term, 1971

70-286

IOWA BEEF PACKERS, INC.,
Petitioner,

v.

EDWARD D. THOMPSON, *et al.*,
Respondents.

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF IOWA

BRIEF FOR THE RESPONDENTS

RAYMOND EDWARD FRANCK
Raun & Franck
Counsel for Respondents

203 N. Main
Denison, Iowa 51442

THE CASILLAS PRESS, INC.—1717 K Street, N. W.—Washington, D. C.—223-1220

INDEX

	Page
OPINIONS BELOW	1
JURISDICTION	2
STATUTES	2
QUESTIONS PRESENTED	2
STATEMENT OF THE CASE	3
ARGUMENT	
I. THE FEDERAL POLICY FAVORING ARBITRATION OF LABOR DISPUTES IS NOT IMPLICATED HERE BECAUSE NO ARBITRABLE QUESTION WAS PRESENTED UNDER THE CONTRACT, THAT POLICY IS NOT APPLICABLE, AND RESPONDENTS COMPLIED WITH IT IN ANY EVENT	7
II. FEDERAL LABOR POLICY FAVORING ARBITRATION OF PRIVATE-CONTRACT CLAIMS DOES NOT APPLY TO THE ASSERTION OF FEDERAL PUBLIC STATUTORY RIGHTS UNDER THE FLSA	15
III. EVEN IF THE POLICY FAVORING COMPULSORY ARBITRATION APPLIES TO SOME FEDERAL RIGHTS, ITS APPLICATION TO FLSA CLAIMS IS WHOLLY INAPPROPRIATE AND WOULD UNDERMINE COLLECTIVE BARGAINING THROUGH ARBITRATION INSTEAD OF PROMOTING IT	27

CONCLUSION 34

APPENDIX A-1

CITATIONS

Cases:

Armour & Co. v. Wantock,
323 U.S. 126 8

Atkinson v. Sinclair Refining Co.,
370 U.S. 238 7

Beckley v. Teyssier,
332 F.2d 495 . . . . . 31, 32

Bernhardt v. Polygraphic Co.,
350 U.S. 198 . . . . . 15, 18, 23, 25, 32, 33

Brooklyn Savings Bank v. O'Neil,
324 U.S. 697 . . . . . 10, 13, 14, 21, 25, 26, 31, 32, 33

Carey v. Westinghouse Corp.,
375 U.S. 261 . . . . . 11, 24, 30

Collyer Insulated Wire Co.,
192 N.L.R.B. No. 150, 77 L.R.R.M. 1931 24

Desrosiers v. American Cyanamid Co.,
377 F.2d 864 12

Donahue v. Susquehanna Collieries Co.,
138 F.2d 3 . . . . . 31, 32, 34

Electrical Workers v. Miller Metal Prods.,
215 F.2d 221 . . . . . 18, 33

Evans v. Hudson Coal Co.,
165 F.2d 970 . . . . . 31, 34

Furniture Workers v. Colonial Hardwood Flooring Co.,
168 F.2d 33 . . . . . 18, 32

Page

Gatliff Coal Co. v. Cox,
142 F.2d 876 32

Garner v. Teamsters,
346 U.S. 485 23

Glover v. St. Louis-San Francisco Rway. Co.,
393 U.S. 324 12

Hornel v. Helvering,
312 U.S. 552 (1940) 9

H.K. Porter Co. v. NLRB,
397 U.S. 99 13

Lincoln Mills of Ala. v. Textile Workers,
230 F.2d 81, aff'd *sub silentio* 353 U.S. 448 . . . 18, 33

Machinists Lodge 743 v. United Aircraft Corp.,
337 F.2d 5 11

McClanahan v. Mathews,
440 F.2d 320 21

Mercury Oil Refining Co. v. Oil Workers,
187 F.2d 980 . . . . . 18, 32

Motor Coach Employees v. Penna. Greyhound Lines,
192 F.2d 310 32

NLRB v. Acme Industrial Co.,
385 U.S. 432 . . . . . 11, 15, 24

NLRB v. C & C Plywood Corp.,
385 U.S. 421 . . . . . 10, 13, 30

NLRB v. Gissel Packing Co.,
395 U.S. 575 12

NLRB v. Marine Workers,
391 U.S. 418 10

Page

NLRB v. Strong,
393 U.S. 357 10

O'Mara v. Erie-Lackawanna RR. Co.,
407 F.2d 674, aff'd *sub nom Czosek v. O'Mara,* 397 U.S. 25 28

Penna. Greyhound Lines v. Motor Coach Employees,
193 F.2d 327 32

Republic Pictures Corp. v. Kappler,
151 F.2d 543, aff'd mem. 327 U.S. 757 11

Republic Steel Corp. v. Maddox,
379 U.S. 650 . . . . . 7, 9, 12, 13, 14, 15, 27, 29, 30

Rubber Workers Local 12 v. N.L.R.B.,
368 F.2d 12, cert. den., 389 U.S. 837 28

Schulte v. Gangi,
328 U.S. 108 . . . . . 14, 21, 26, 31, 32, 33

Shirley-Herman Co. v. Hod Carriers,
182 F.2d 806 32

Smith v. Evening News Assn.,
371 U.S. 195 11

Steelworkers v. American Mfg. Co.,
363 U.S. 564 . . . . . 13, 15, 32

Steelworkers v. Enterprise Wheel & Car Corp.,
363 U.S. 593 . . . . . 9, 13, 14, 15, 23, 32

Steelworkers v. Galland-Henning Mfg. Co.,
241 F.2d 323 33

Steelworkers v. Warrior & Gulf Co.,
363 U.S. 574 . . . . . 7, 8, 13, 15, 23, 24, 26, 32

Teamsters Local 674 v. Lucas Flour Co.,
369 U.S. 95 11

Page

Tenney Engineering Co. v. Electrical Workers Local 437, 207 F.2d 450 33

Textile Workers v. Lincoln Mills of Ala., 353 U.S. 448 32

U. S. Bulk Carriers v. Arguelles, 400 U.S. 351 . . . . . 6, 9, 16, 17, 18, 19, 20, 22, 23, 25, 27, 30, 31, 33

U. S. v. Darby, 312 U.S. 100 . . . . . 13, 22, 27

Vaca v. Sipes, 386 U.S. 171 . . . . . 12, 15, 23, 28, 29, 30

Walling v. Belo Corp., 316 U.S. 624 . . . . . 21, 22, 26

Walters v. St. Louis, 347 U.S. 231 (1954) 9

Watkins v. Hudson Coal Co., 151 F.2d 311, cert. den., 327 U.S. 777 . . . . 31, 34

Wilko v. Swan, 346 U.S. 427 . . . . . 9, 23, 24, 29, 32, 33, 34

Wirtz v. Malthor, 391 F.2d 1 19

Statutes:

Fair Labor Standards Act of 1938, c. 676, 52 Stat. 1060, as amended, 29 U.S.C. 201, *et seq:* 21

Section 3(o) 22
Section 7 26
Section 7(a) 2, 6
Section 16(b) 2, 6, 14, 19, 21, 29

Page

Labor Management Relations Act of 1947, 29 U.S.C. 141, *et seq:*

Section 203(d) 2
Section 301 . . . . . 2, 7, 13, 16, 17, 19, 22, 33

Portal-to-Portal Act of 1947 (61 Stat. 84, 29 U.S.C. 251, *et seq*):

Section 1(b)(2) 19
Section 3 14
Section 3(a) 33
Section 4 2
Section 4(a)(b) 26, 31, 33
Section 6 . . . . . 2, 29
Section 6(a) 6, 19
Section 7 . . . . . 2, 19, 29
Section 10 2
Section 10(a) 20
Section 11 . . . . . 2, 20, 21, 22

United States Arbitration Act of 1925, 9 U.S.C. 1, *et seq:* 2, 18, 31

Miscellaneous:

28 U.S.C. 1257(3) 2
28 U.S.C.A. 2106 9
29 U.S.C. 158 24
29 U.S.C. 207 26
29 U.S.C. 215 19
29 U.S.C. 255(a) 6
S. 1861, 92nd Cong., 1st Sess. 21
H.R. 7130, 92nd Cong., 1st Sess. 21
H. Rept. 92-672, 92nd Cong., 1st Sess. 21
S. Rept. 37, 80th Cong., 1st Sess. 26

Page

111 Cong. Rec. 10794, 89th Cong., 1st Sess. 29
65-2 CCH Arb. ¶8691 12
64-1 CCH Arb. ¶8270 12
61-2 CCH Arb. ¶8377 12

IN THE

Supreme Court of the United States

October Term, 1971

No. 70-286

IOWA BEEF PACKERS, INC.,

Petitioner,

v.

EDWARD D. THOMPSON, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF IOWA

BRIEF FOR THE RESPONDENTS

OPINIONS BELOW

The trial court's denial of Petitioner's motion to dismiss (A. 7-8)[1] and the trial court's final judgment

---

[1] "A." references are to the printed appendix prepared for this Court. "R." references are to the record in the Iowa Supreme Court, filed with the briefs in this Court.

(A. 9-10) are unreported. The opinions of the Iowa Supreme Court (A. 12-28) are reported at 185 N.W.2d 738.

JURISDICTION

The opinions of the Iowa Supreme Court issued April 9, 1971 and certiorari was granted October 12, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. 1257(3).

STATUTES

This case arises under §§7(a) and 16(b) of the Fair Labor Standards Act of 1938, as amended, 29 U.S.C. 201 *et seq.* (Supp. A, *infra*). Relevant portions of §§4, 6, 7, 10 and 11 of the Portal-to-Portal Act of 1947, as codified, 29 U.S.C. 251 *et seq.*; and of the United States Arbitration Act of 1925, as codified, 9 U.S.C. 1 *et seq.*, are printed as Supplements B and C respectively, *infra*. §§203(d) and 301(a) of the Labor Management Relations Act of 1947, 29 U.S.C. 173(d), 185(a) are printed as Supplement A to Petitioner's Brief.

QUESTIONS PRESENTED

1. Whether an arbitrable dispute existed on the facts of this case.

2. Whether employees asserting substantial federal rights under the Fair Labor Standards Act are required to attempt exhaustion of arguably applicable private grievance-arbitration procedures before bringing suit to vindicate those rights in court.

STATEMENT OF THE CASE

I. Facts

At all relevant times Petitioner was engaged in the processing and sale of meats in interstate commerce at Denison, Iowa, and its employees were covered by a collective bargaining contract with the Associated Employees Organization which provided time and one-half payment for hours worked in excess of forty per week and guaranteed "A lunch period . . . no later than five hours from the start of an employee's shift" (A. 29).[2] The contract also contained a no-strike clause, and further provided that "Should the Union or any individual employee desire to process a grievance pertaining to a violation of the Agreement, the matter shall be handled" by a three-step grievance procedure culminating in binding arbitration (A. 31, 29; R. 6). The first step of this grievance procedure was foreclosed if the aggrieved employee did not submit a written grievance "within ten days of the knowledge of the incident"; subsequent steps were deemed waived if stringent time limitations for pursuing them were not met; and control of his grievance after the first step was taken from the "individual employee" and placed in the exclusive hands of "the Union grievance committee or any officers designated by the Union" (A. 29-30, 31; R. 6-7, 8). Arbitration could only be invoked by the Petitioner or the Union, and the arbitrator's authority was expressly limited to application of "the terms and conditions specifically set forth in the Agreement" (A. 30; R. 8).

---

[2] Coverage of Petitioner under the Fair Labor Standards Act is admitted (A. 2-3, 4-5; R. 9). The "Associated Employees Organization" is apparently a Company Union.

From the Denison plant's opening in 1961 it was plagued with mechanical breakdowns, and the maintenance employees working under this contract were required to stay on the premises during their lunch period and to eat close to the kill floor where they could hear the bell signalling production stoppages (A. 14, 16; R. 10, 12-13, 17-18, 20-21, 25, 36, 38; 41-42).[3] Each time the bell sounded they were expected to abandon their lunch and help with repairs – a situation which frequently occurred several times in a single day (A. 14; R. 12-13, 18, 19-20, 22, 24-25, 29, 35-36, 44). In 1962 the Company constructed a special lunchroom for maintenance men, within hearing of the bell, for the express purpose of ensuring that they were "on call" at all times to mitigate expensive breakdowns. Other employees ate in locations beyond the bell's reach (A. 14; R. 10, 13, 17, 19, 21-22). In February 1966 one of the maintenance men filed a grievance over his failure to get full lunch periods which precipitated a meeting with Company officials at which the maintenance men were told that they were free to leave the plant during lunch and that their lunch periods would be staggered so that only those not eating would be called (A. 14; R. 15, 19-20, 26-27, 28-30, 34-35; 42-43). However, the grievance was never processed, and the situation continued as before: the equipment continued to break down, the maintenance men were required to stay close and answer the bell regardless of their lunch status, and the only way they could escape being called was to leave the plant during their brief lunch period, at risk of discipline, before the bell was

---

[3] Facts found by the courts below are admitted by Petitioner for purposes of this review (Pet., p. 3 para. 5, 4; Pet. Br., p. 5).

rung (A. 14-15, 16-17; R. 11, 12, 21-23, 29, 30-31, 36, 38, 39, 40; 43-44).[4]

In 1967, after the instant complaints were filed, the Company's vice-president for industrial relations wrote the maintenance men repeating "Because of the claims made in the law suits . . . that you are not required to eat in any particular area or even to remain on the premises during your lunch period" and inviting them to grieve "if, at any time, you receive any instructions from any management persons which seem contrary to the above" (A. 15; R. 11-12, 14-15, 18, 31-32, 39, 40). When three maintenance men subsequently refused to answer the bell in accord with this letter they were called before the plant superintendent and ordered to "forget about [the letter]," to "just go on answering the bell" because "them guys up in the front office don't know how things are back here" (R. 11-12, 13, 14, 16-17, 21-22, 31-32; 43-44). The maintenance men were never adequately compensated for their lunch time, which was in excess of their regular forty hours per week, and were never effectively released from their duty to remain, at all times, on call (A. 3-4, 14-15, 16-17; R. 11, 12, 21, 22, 25, 29, 30-31, 35-36).

---

[4] The Company's assertion that this grievance resulted in the men being paid for their lunch time (Pet. Br., p. 18 n.2) is based on the self-serving statement of a Company official which is flatly contradicted by the other evidence (A. 3, 5, 14-15; R. 25, 26-27). Indeed, several maintenance men testified that they were not paid even straight time for their lunch periods and that they were not informed of any lunch-period change until May of 1967; and their testimony was stipulated to be representative (R. 9, 11-12, 13, 16, 18, 19, 21-23, 24, 25, 39, 40; 43-45). In addition, the Company officials who testified all admitted that they did not really know what went on in the production area (R. 30-32, 33, 35, 38).

II. Decisions Below

On April 28, 1967 thirteen maintenance men filed suit in Iowa District Court for overtime, liquidated damages, costs and attorney's fees under §§7(a) and 16(b) of the Fair Labor Standards Act, alleging uncompensated lunch time for the two-year period preceding suit (A. 2-4).[5] In March 1968 the District Court denied the Company's motion to dismiss for failure to exhaust contract grievance procedures because "the right of recovery for work performed which is compensable under the provisions of the Fair Labor Standards Act . . . cannot be restricted, abrogated or nullified by any agreement entered into by . . . employees with their employer, or by and through a collective bargaining agreement entered into with the employer and the representative of the employees" (A. 8). After full trial the Court found that the maintenance employees were on call during their lunch periods and awarded them the overtime, costs and attorney's fees claimed, but declined to award liquidated damages (A. 9-10; R. 40-46). The Iowa Supreme Court affirmed by a vote of five to two on the ground that "the general Congressional intent favoring arbitration can[not] stand against the specific Congressional intent which is manifest in the Fair Labor Standards Act provisions giving employees strong and detailed rights in court," and that "if Congressional intent to allow a seaman to arbitrate or sue at his option is manifest in the seaman's act involved in *Arguelles* [see *infra*, pp. 15-17] . . . then an intent to give workmen such an

---

[5] Damages for violations occurring earlier than two years preceding suit are precluded by the applicable statute of limitations. Portal-to-Portal Act, §6(a), *infra*, Supp. B, 29 U.S.C. 255(a). A fourteenth plaintiff filed suit on December 12, 1967 (A. 1).

option is also manifest in the Fair Labor Standards Act" (A. 19-20).

ARGUMENT

I. THE FEDERAL POLICY FAVORING ARBITRATION OF LABOR DISPUTES IS NOT IMPLICATED HERE BECAUSE NO ARBITRABLE QUESTION WAS PRESENTED UNDER THE CONTRACT, THAT POLICY IS NOT APPLICABLE, AND RESPONDENTS COMPLIED WITH IT IN ANY EVENT.

The arbitration policy erected by this Court under §301(a) of the Labor Management Relations Act – that disputes between parties to a collective bargaining contract affording grievance-arbitration are presumed arbitrable, *Steelworkers v. Warrior & Gulf Co.*, 363 U.S. 574, 581 (1960), and that "As a general rule . . . federal labor policy requires that individual employees wishing to assert *contract* grievances must attempt use of the contract grievance procedure," *Republic Steel Corp. v. Maddox*, 379 U.S. 650, 652 (1965) (emphasis added) – is dependent upon the availability of adequate grievance procedures. *Steelworkers v. Warrior & Gulf Co., supra*, 363 U.S. at 582-583; *Republic Steel Corp. v. Maddox, supra*, 379 U.S. at 653, 656. Where the contract makes a subject non-arbitrable, or so limits the arbitrator's authority as to preclude a meaningful remedy, the policy does not apply. See *Steelworkers v. Warrior & Gulf Co., supra*, 363 U.S. at 582; *Atkinson v. Sinclair Refining Co.*, 370 U.S. 238, 243 (1962). Both factors are present here. The contract sharply limits its grievance procedures to "violation[s] of the Agreement" (A. 29), and contrary to Petitioner's contention (Br., pp. 3, 4, 5, 6), Respondents assert no violation by the Company of a contract right to work-free

lunch periods; they merely seek to be paid for lunch time because it was subject to call. *E.g., Armour & Co. v. Wantock,* 323 U.S. 126 (1945). But the contract says nothing about the duration of lunch periods or their status as on-call or free; it merely states that "A lunch period shall be provided no later than five hours from the start of an employee's shift" (A. 29). Since such a period was unquestionably provided (Pet. Br., p. 18 n. 2; A. 3, 16-17; R. 10, 12, 17-18, 19-20, 22, 28-29, 35-37; 41-43, 45), this term could not have been violated, and the dispute was not arbitrable. "For arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed to submit." 363 U.S. at 582. While a typical arbitrator might have applied the common law of the shop to this lunch period provision to determine whether it incorporated duration and status requirements, and was therefore violated, the instant contract precludes such action by expressly stating that the arbitrator "shall not have authority other than to apply the terms and conditions specifically set forth in the Agreement" — a limitation which effectively blocks meaningful arbitration here. *Id.,* at 580. The only other contract term which might conceivably have been violated so as to constitute a "grievance" as defined was the provision stipulating time and one-half payment for hours worked in excess of eight per day or forty per week (A. 29). But that term is admittedly dependent upon a finding that the lunch period provision has been breached (Pet., pp. 2 para. 2, 3 para. 4, 7-8, 11; Pet. Br., pp. 6, 11-12, 17). Moreover, the contract is as silent regarding the content of "hours worked" as it is on the duration and status of any lunch periods; and since Petitioner neither argued this provision below nor raised it as an independent ground for arbitral jurisdiction in its petition for certiorari (Cf. A. 17; Pet., pp. 2 para. 2,

5 para. 3, 7-8, 11) Petitioner should be precluded from raising it here. *Walters v. St. Louis*, 347 U.S. 231, 233 (1954); *Hormel v. Helvering*, 312 U.S. 552, 556 (1940). See cases collected under 28 U.S.C.A. 2106, n. 25 (1967). Indeed, in light of the Company's consistent position that only a contract right to work-free meal time is involved (Br., pp. 6, 7, 8, 10, 11, 15-16, 17, 19) and that compensating these employees awards a "windfall" because they actually got some time to eat (Br., p. 18 n. 2; "Resistance," pp. 3-4; A. 17), Petitioner's arguments reduce to the single contention that its interpretation of "hours worked" as excluding on-call time does not contravene the Fair Labor Standards Act. That position on "hours worked" may be a correct interpretation of this contract; but since the arbitrator is limited to construction of the contract, and cannot pass on statutory claims or defenses absent a submission incorporating them, see *Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597, 599 (1960); cf. *Wilko v. Swan*, 346 U.S. 427, 432 n. 18 (1953), such a contention is not arbitrable either.

No different result is required by the Company's incessant attempts to drag this case within the ambit of *Republic Steel Corp. v. Maddox, supra*, by insisting that only a pure contract right to work-free lunch periods – which nowhere appears in the contract – is involved. In the first place, that contention seriously distorts the record. The employees' complaint was squarely bottomed on statutory right (A. 2-3, 5); the trial court denied Petitioner's motion to dismiss on the ground that a statutory right could not be diminished by contractual agreement (A. 8); both sides of the court below thought a statutory right was being asserted (A. 14, 19-20, 21, 25, 26); and Petitioner's reliance on the dissenting opinion in *U.S. Bulk Carriers v. Arguelles*, 400 U.S. 351 (1971), which solely

concerned a conflict between contract arbitration and a federal statute, belies awareness that a statutory right is implicated here. That the FLSA provides for no work-free lunch time (Pet. Br., p. 10, *passim*) is wholly irrelevant. The FLSA requires employers to pay time-and-a-half for hours worked in excess of forty per week (Supp. A., *infra*); it was intended to apply uniformly "to all employers subject thereto unless expressly exempted," *Brooklyn Savings Bank v. O'Neil*, 324 U.S. 697, 710 & n. 25 (1945); contrary to Petitioner's suggestion (Br., pp. 12-13), it contains no blanket exemption for employers operating under collective bargaining contracts. If no contract had existed, these employees could still have asserted their identical claim. If they had worked through every lunch period and not totalled over forty hours per week, they would have had no statutory claim whatever their contract rights. Two distinct rights are clearly involved here, one contractual and arguably remediable by arbitration, one statutory and looking, at least ordinarily, to direct relief in court. That they may overlap does not mean either is extinguished.[6]

---

[6] Petitioner's similar suggestion that Respondents are estopped from asserting federal labor rights because they accepted general benefits under a collective bargaining contract affording arbitration (Br., pp. 3, 6, 12, 14-15) is equally inapposite. Since the employees would have possessed the same FLSA rights had no collective bargaining contract existed, they cannot be estopped from asserting those rights merely because a union negotiated additional benefits for them. Under Petitioner's reasoning, employees would be foreclosed from filing unfair labor practice charges because they happened to benefit from contracts containing internal means of adjustment – a result this and other courts have consistently rejected. See, *e.g.*, *NLRB v. Strong*, 393 U.S. 357 (1969); *NLRB v. Marine Workers*, 391 U.S. 418, 424 and cases there cited (1968); *NLRB v. C&C Plywood Corp.*,

(continued)

Second, even if *Republic Steel Corp. v. Maddox* is applicable, Respondents substantially complied with it. If, as the Court there noted, "it cannot be said, in the normal situation, that contract grievance procedures are inadequate to protect the interests of an aggrieved employee until [he] has attempted to implement the procedures and found them so," 379 U.S. at 653, such an attempt was plainly made here. As shown *supra*, pp. 4-5, a year before these suits were filed one of the maintenance men instituted grievance procedures because he was not getting a lunch period five hours after the start of his shift, as guaranteed by the contract. This action precipitated a hasty meeting with Company officials at which some maintenance men were told that they could leave the premises during lunch and that their lunch periods would be staggered so all could eat in accord with the contract; but these promises were ignored by the employees' supervisors,

---

[6] (continued) 385 U.S. 421, 428 (1967); *NLRB v. Acme Industrial Co.*, 385 U.S. 432, 435-437 (1967); *Carey v. Westinghouse Corp.*, 375 U.S. 261, 270-272 (1964); *Machinists Lodge 743 v. United Aircraft Corp.*, 337 F.2d 5, 8, 9 (C.A. 2, 1965). Cf. *Smith v. Evening News Assn.*, 371 U.S. 195, 197 (1962); *Teamsters Local 674 v. Lucas Flour Co.*, 369 U.S. 95, 101 n. 9 (1962).

Petitioner's further reliance on *Republic Pictures Corp. v. Kappler*, 151 F.2d 543 (C.A. 8, 1945), aff'd mem. 327 U.S. 757, for the proposition that FLSA claims are contract actions (Br., p. 22 n. 3), is wholly misplaced. That case arose before the FLSA contained a statute of limitations, and merely characterized FLSA claims as contract actions for statute of limitations purposes in the course of holding a state statute discriminatorily restricting the time for filing federal claims unconstitutional. *Id.*, at 546-547. Characterizing FLSA claims as procedural contract actions in order to expand court access of course has no relation to characterizing them as substantive contract claims for purposes of restricting court access.

and the Union never processed the grievance. If a grievance for lunch time which was clearly arbitrable under the contract proved so ineffective, the employees could only have thought that a grievance for lunch pay which was arguably arbitrable, and difficult to win,[7] would only prove more so. Indeed, the futility of this grievance seems to have been the principal motive for the instant suits (A. 14-15). Particularly in light of the susceptibility of employees to employer suasion, see *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 617 (1969); the Union's passivity; the fact that even after these suits similar promises were made and equally ignored, *supra*, p. 5; the fact that the employees were bluntly ordered by the plant superintendent and his immediate subordinates to "forget about grieving", *supra*, p. 5; and the admission of Company officials that they had no knowledge of or real control over the maintenance men's condition (R. 30-32, 33, 35) – a fact which must surely have been obvious to the maintenance men themselves – Respondents clearly "attempted to implement the [grievance] procedures and found them [inadequate]." 379 U.S. at 653. No more should be demanded, since the courts will not require a futile act as a condition precedent to court vindication of an existing right. *Glover v. St. Louis-San Francisco Rway. Co.*, 393 U.S. 324, 329-331 (1969); *Desrosiers v. American Cyanamid Co.*, 377 F.2d 864, 870 (C.A. 2, 1967); see *Vaca v. Sipes*, 386 U.S. 171, 185-186 (1967).

---

[7] It seems clear that if arbitration were ever reached the Company would again argue that on-call time was not "hours worked" under the contract (A. 15-17). Such contentions have been accepted by arbitrators. See, e.g., 65-2 CCH Arb. ¶8691 (1965); cf. 64-1 CCH Arb. ¶8270 (1963); 61-2 CCH Arb. ¶8377 (1961).

Finally, *Republic Steel Corp. v. Maddox* is not applicable to this case. The arbitration requirement of *Maddox* and the *Steelworkers Trilogy*[8] primarily rested on the assumption that grievance procedures afforded continued bargaining between employer and union to fill in the gaps in the contract proper. *Steelworkers v. Warrior and Gulf Co., supra,* 363 U.S. at 580-581; *Steelworkers v. Enterprise Wheel & Car Corp., supra,* 363 U.S. at 596; *Maddox, supra,* 379 U.S. at 653. As the *Maddox* court noted, "Such activity complements the union's status as exclusive bargaining representative by permitting it to participate actively in the continuing administration of the contract." *Id.* This position was entirely proper, since *Maddox* and the *Steelworkers* cases presented contract disputes decided under §301 of the Labor-Management Relations Act – a statute whose main thrust is to promote collective bargaining by getting the parties to the bargaining table, without regulating the terms and conditions of employment on which they may subsequently agree. *E.g., H. K. Porter Co. v. NLRB,* 397 U.S. 99, 103-106 (1970); *NLRB v. C&C Plywood Corp.,* 385 U.S. 421, 427 (1967). But the Fair Labor Standards Act imposes absolute requirements regarding minimum-wage and overtime; unlike the LMRA, it was *intended to regulate,* with nationwide uniformity, the terms of employment to which it speaks. *E.g., U.S. v. Darby,* 312 U.S. 100 (1941); *Brooklyn Savings Bank v. O'Neil,* 324 U.S. 697, 710 & n. 25 (1945). In the face of such absolute statutory requirements, no union interest in further bargaining through the grievance process is present, since there is nothing to bargain over; either the employer has violated the Act, or he has not. This is particularly true where, as here, rights under the statute are

[8] *Steelworkers v. American Mfg. Co.,* 363 U.S. 564 (1960); *Steelworkers v. Warrior & Gulf Co.,* 363 U.S. 574 (1960); *Steelworkers v. Enterprise Wheel & Car Corp.,* 363 U.S. 593 (1960).

expressly granted to individual employees independently of the collective-bargaining relationship, and cannot be waived or altered by their bargaining representatives because those rights are not merely compensatory, but enforcement tools designed to protect competing employers from whose interests the union's may radically diverge. *E.g.*, FLSA §§2, 16(b), Supp. A, *infra;* Portal Act, §3, 29 U.S.C. 253; *Schulte v. Gangi*, 328 U.S. 108, 116 (1946). As this Court has approvingly noted, "An employer is not to be allowed to gain a competitive advantage by reason of the fact that his employees [or their bargaining representative] are more willing to waive [FLSA] claims . . . than those of his competitor . . . No employee . . . need fear that the fair labor standards maintained by his employer will be jeopardized by oppresive labor standards maintained by those with whom his employer competes." *Brooklyn Savings Bank v. O'Neil, supra*, 324 U.S. at 710 & n. 25. We show *infra*, pp. 15, 21-27, that to require unions to process such claims through grievance arbitration would undermine this salutary policy without advancing competing ones.

Republic Steel Corp. v. Maddox additionally rested on the dual assumption that "handling of grievance claims will enhance the union's prestige with employees" and that absent compulsory arbitration of troublesome contract claims employers would attempt to exclude these subjects from the grievance-arbitration process. 379 U.S. at 653, 656. But where, as here, the statute guarantees employees a calculable remedy and the union's pursuit of their grievance wins them less – a significant danger in view of the fact that the arbitrator is bound to the contract, 363 U.S. at 597, 599, the contract may preclude statutory remedies even if a breach is found, and the union's nearly unreviewable

discretion to settle contract claims short of arbitration, *Vaca v. Sipes, supra,* 386 U.S. at 191-192, 194-195 – the union's prestige will be diminished, not enhanced. Moreover, it is common knowledge that the statutory wage-hour guarantees are a powerful aid to union bargaining, especially in areas where the Act's application is unclear; and assertion of statutory claims by individual employees in court relieves unions of the considerable time and expense involved in the higher steps of grievance proceedings. 386 U.S. at 191-192; *NLRB v. Acme Industrial Co.,* 385 U.S. 432, 438 (1967). If such claims are universally forced through grievance arbitration subject to contract diminishment, the uncertainties of extraevidentiary and unreviewable arbitral decision, see 363 U.S. at 596; *Bernhardt v. Polygraphic Co.,* 350 U.S. 198, 203-204 & n. 4 (1956), and the incurring of extra expense, unions rather than employers will seek to restrict the scope of grievance-arbitration so as to exclude them from its reach. Congress and the *Maddox* court could not have intended, and this Court should not reach, such a result.

II. FEDERAL LABOR POLICY FAVORING ARBITRATION OF PRIVATE-CONTRACT CLAIMS DOES NOT APPLY TO THE ASSERTION OF FEDERAL PUBLIC STATUTORY RIGHTS UNDER THE FLSA.

Maddox and the *Steelworkers Trilogy* involved pure contract disputes in which the resisting party was remitted to grievance-arbitration because he had agreed to it as the mode of redress. 379 U.S. at 652; *Vaca v. Sipes, supra,* 386 U.S. at 184. Neither involved an independent statutory remedy, let alone an independent statutory right.

But in *U.S. Bulk Carriers v. Arguelles*, decided the past term, this Court held that a federal statute giving seamen the right to sue in court for prompt payment of wages and double damages prevailed over a contract arbitration clause unquestionably covering the dispute, despite the fact that the seaman's substantive rights were purely contractual and the statute merely afforded him a remedy. 400 U.S. 351, 352, 362, 371, 374 (1971). Four justices held that the 1790 statute, which merely provided that double damages "shall be recoverable as wages in any claim made before the court," implied "a right to make the claim to the court and not a duty to make it before a grievance committee or . . . an arbiter," *Id.*, at 353-354; that "while an arbitrator . . . may have [factual] expertise, for 180 years federal courts have been protecting the rights of seamen" and possessed equal skills, *Id.*, at 356;[9] and that "the chronology of the two statutes – §596 [of the seamen's act] and §301 [of the LMRA] – makes clear that the judicial remedy was made explicit in §596 and was not clearly taken away by §301. What Congress has plainly granted we hestitate to deny." *Id.*, at 357. Moreover, the majority noted, *Ibid.*,

> In *Maddox* there was no express exception governing individual [contract] claims of employees from §301 grievance procedures and we declined to carve one out under the circumstances there present. The circumstances here are quite different because of the express judicial remedy created by §596. The reluctance in *Maddox* to

[9] This observation was not practically accurate, for the courts had only resumed such protection since 1946, when the shipping commissioners who had performed this function for 75 years were eliminated. *Id.*, at 355.

> redesign the statutory regime of §301 makes us equally reluctant to redesign the statutory scheme of §596.

They therefore concluded that the seaman could grieve or sue at his option. Justice Harlan concurred on the ground that while the mere statutory provision of a judicial forum did not *per se* foreclose grievance-arbitration, the presence of a statutory remedy rebutted the requirement of arbitration because of the "congressional policy to secure to the individual seaman the prompt payment of his wages as part of a broader protective and remedial scheme" which could not be foreclosed by "the unreviewable discretion of the arbitrator." 400 U.S. at 359, 362-363, 365. The dissent expressly relied on the fact that the contract in question provided for arbitration of all disputes between the parties rather than just contract claims, and that the statutory remedy was entirely dependent upon a finding that the plaintiff's contract claim was valid. *Id.*, at 371, 373.

This case is far stronger than *Bulk Carriers.* The statute there merely implied a right to sue in court; the FLSA is explicit. The statute there antedated the LMRA; the FLSA also antedates the LMRA, and the courts have been continuously applying it for eight years longer than the seaman's act. 400 U.S. at 355; n. 9, *supra.* That the FLSA is more recent than the seaman's act does not, as Petitioner argues (Br., pp. 7, 12-13), undercut its priority, but rather strengthens that priority, since the FLSA was a far more important statute enacted close in time to §301, yet the legislative history of §301 evinces no intent to displace the FLSA in favor of arbitration either. Cf. 400 U.S. at

352, 356.[10] Moreover, the factors on which the *Bulk Carriers* dissent relied are not present here. The instant arbitration clause is narrowly limited to violations of the contract, and does not encompass violations of the unwritten common law of the shop, much less statutory disputes (A. 29, 30). The instant statute, unlike the seaman's act, confers an independent right as well as a remedy,[11] and

---

[10] Petitioner's suggestion that the U.S. Arbitration Act of 1925 shows a congressional preference for labor arbitration which antedates the FLSA (Br., pp. 15, 18-19) is legally untenable, since that Act specifically excludes contracts of employment from its reach. 81, Supp. C, *infra; Lincoln Mills of Ala. v. Textile Workers*, 230 F.2d 81, 86-87 (C.A. 5, 1956), aff'd sub silentio as to this point, 353 U.S. 448 (1957); *Electrical Workers v. Miller Metal Prods.*, 215 F.2d 221, 224 and cases cited (C.A. 4, 1954); *Mercury Oil Refining Co. v. Oil Workers*, 187 F.2d 980, 983 and cases cited (C.A. 10, 1951). Cf. *Bernhardt v. Polygraphic Co.*, 350 U.S. 198, 201 n. 2 (1956) (by implication). In the Arbitration Act "Congress was steering clear of compulsory arbitration of labor disputes, and unless the excepting clause . . . is applied to the entire act . . . sec. 4 would give the court power to force arbitration in any agreement providing for arbitration where there is jurisdiction because of diversity . . . or other reasons." *Furniture Workers v. Colonial Hardwood Flooring Co.*, 168 F.2d 33, 36 (C.A. 6, 1948).

As Justice Frankfurter noted in his *Lincoln Mills* dissent, 353 U.S. at 466, "In 1925 Congress passed the . . . Arbitration Act . . . explicitly excluding 'contracts of employment' . . . from its scope. . . . I find rejection, though not explicit, of the availability of the Federal Arbitration Act to enforce [labor] arbitration clauses in the silent treatment given that Act by the Court's opinion . . . I would make this rejection explicit, recognizing that when Congress passed legislation to enable arbitration agreements to be enforced by the federal courts, it saw fit to exclude this remedy with respect to labor contracts."

[11] Petitioner's claim that the seaman's statute in *Bulk Carriers* conferred "both the right and the remedy" (Br., pp. 17-18) misstates that decision. Cf. 400 U.S. at 352-353, 362, 367-371, 374.

that right is not merely intended to ensure private-party compensation, cf. 400 U.S. at 364-365, but is designed to protect employees from detrimental work conditions, and complying employers from substandard competition, as part of a public remedial enforcement scheme far broader than the seaman's act. §2, Supp. A, *infra;* cases *supra,* pp. 13-14; *Wirtz v. Malthor,* 391 F.2d 1, 3 (C.A. 9, 1968).

Thus, §16(b) provides for the recovery of unpaid wages, and "an additional equal amount as *liquidated damages*," in "*any court of competent jurisdiction*." Supp. A, *infra.* It provides for class actions if written consent of class members "*is filed in the court.*"[12] It permits "*the court in such action*" to grant reasonable costs and attorney's fees, and cuts off the employee's right to bring suit when the Secretary of Labor does. These provisions clearly contemplate unrestricted court action to vindicate FLSA claims regardless of grievance-arbitration; cf. also §15(a)(3), 29 U.S.C. 215(a)(3). And the same Congress which enacted §301 confirmed this reading by enacting the Portal-to-Portal Act amending the FLSA. That Act, which was expressly passed "to protect . . . collective bargaining," §1(b)(2), 29 U.S.C. 251(b)(2), looks entirely to court action. It provides a two-year statute of limitation for "any *action* commenced" after its enactment, "except that a *cause of action* arising out of a *willful violation* may be commenced within three years after [it] . . . accrued." §6(a), Supp. B, *infra.* It states that an action is commenced "*on the date when the complaint is filed . . . in court.*" §7. It allows a good-faith defense to an employer

[12] Thus Petitioner's contention that grievance-arbitration provides a better remedy because 14 actions were filed below (Br., pp. 4, 13) is beside the point, since a single action could as well have been filed here as in grievance proceedings.

who "*pleads and proves* that the act or omission complained of was in *good faith* in conformity with and *in reliance on* any . . . administrative regulation . . ." §10(a). Finally, it provides that:

> if the employer shows *to the satisfaction of the court* that the act or omission giving rise to such action was in *good faith* and that he had *reasonable grounds* for believing that [it] . . . was not a violation of the Fair Labor Standards Act . . . *the court may, in its sound discretion,* award no liquidated damages or . . . any amount thereof . . . [§11; emphases added throughout].

The diminishment of liquidated damages and such terms of art as "willfullness," "good faith," and "reasonable grounds" are integral parts of the statute which were plainly meant to be subject to judicial determination only. If this Court in *U.S. Bulk Carriers* could see a right to unrestricted court access in the innocuous countenance of the seaman's statute, such a right is *a fortiori* present here.

Indeed, this Court has expressly considered – and rejected – an argument that since seamen are permitted to waive their statutory rights, employees asserting FLSA rights should be, noting that

> The alternative [to unrestricted court access] is to find in the Act an intention . . . to leave the adjustments to bargaining at the worst between employers and individual employees or at best between employers and the employees' chosen . . . bargaining agent. We think the purpose of the Act [despite its silence] . . . leads to the conclusion that neither wages nor

> the damages for withholding them are capable of [such] reduction by compromise . . .[which] thwarts the public policy of minimum wages, promptly paid . . . by reducing the sum selected by Congress as proper compensation for [their] withholding.

Schulte v. Gangi, 328 U.S. 108, 113, 116 (1946). The Court has also held that the policy of prompt payment embodied in the liquidated damages provision of §16(b) is at least as central to the FLSA as to the seaman's statute, since that provision "constitutes a Congressional recognition that failure to pay the statutory minimum on time may be so detrimental to . . . maintenance of the minimum standard of living . . . and to the free flow of commerce, that double payment must be made in the event of delay in order to insure restitution" for damages difficult to prove. *Brooklyn Savings Bank v. O'Neil*, 324 U.S. 697, 707 & n. 20 and authority cited (1945).[13] As these cases indicate, the Court has exercised exquisite restraint, even where the Act was silent, when asked to alter the enforcement scheme of this broad-ranging statute to which Congress has paid such detailed and consistent attention.[14] See also *Walling v. Belo Corp.*, 316 U.S. 624,

---

[13] That Congress later injected a balancing test by permitting judicial reduction of liquidated damages where the employer acted in good faith belief that he was complying with the statute, Portal Act §11, *infra*, has not altered this fundamental purpose. *E.g., McClanahan v. Mathews*, 440 F.2d 320, 322-323 (C.A. 5, 1971).

[14] Congress has enacted major amendments to the Act in 1939, 53 Stat. 1266, 1436; 1940, 54 Stat. 615; 1947, 61 Stat. 84; 1949, 63 Stat. 446, 910; 1955, 69 Stat. 711; 1957, 71 Stat. 514; 1958, 72 Stat. 948; 1961, 75 Stat. 65; 1963, 77 Stat. 56; and 1966, 80 Stat. 830. Two major bills to further amend it are presently pending. H.R. 7130, 92nd Cong., 1st Sess. (1971) (Dent Bill); S. 1861, 92nd Cong., 1st Sess. (1971) (Williams Bill). See also H. Rept. 92-672 (1971) (to accompany H.R. 7130).

634-635 (1942); *U. S. Bulk Carriers v. Arguelles, supra,* 400 U.S. at 356-358. Where, as here, the Act is explicit, and the rights involved extend far beyond those of the immediate parties to an essentially private collective bargaining agreement, such restraint seems required.

The incompatibility of the FLSA with compulsory grievance-arbitration under §301 becomes especially apparent when the kinds of claims the FLSA produces are scrutinized. Those claims typically involve inextricably mixed questions of fact and law in which a grasp of the rules of evidence and a judicial sense of legal relevance are crucial – for instance, the questions of what constituted "hours worked," the "regular rate," and "good faith reasonable grounds" presented here. FLSA §§3(o), 7(a); Portal Act, §11; see generally, *Walling v. Belo Corp.*, 316 U.S. 624 and cases cited (1942). Moreover, as shown *supra,* pp. 13-14, 18-19, since FLSA standards are intended to protect complying employers from cheap competition by the employer charged, the utmost uniformity in their application is essential.[15] But the non-judicial, non-precedential

---

15 As this Court long ago noted, the "evils aimed at . . . are the spread of substandard labor conditions through the use of . . . interstate commerce for competition by the goods so produced with those produced under the prescribed or better labor conditions . . . The Act is thus directed at a . . . kind of competition in interstate commerce which it has in effect condemned as "unfair." . . . It recognizes that in present day industry competition by a small part may affect the whole and that the total effect of the competition of many small producers may be great." *U.S. v. Darby,* 312 U.S. 100, 122-123 (1941).

In this sense, §301(a) also militates for free court access in the assertion of FLSA claims, since its policy is also one of nationwide uniformity, and "a multiplicity of tribunals and a diversity of procedures [such as would be greatly increased if arbitration of such

(continued)

nature of arbitration – as the *Bulk Carriers* dissent put it, its "quickness" and "informality," 400 U.S. at 375 – is its defining characteristic. *E.g., Steelworkers v. Warrior & Gulf Co., supra*, 363 U.S. at 581-582. As this Court has repeatedly noted, cases which implicate statutory rights require

> subjective findings on the purpose and knowledge of an alleged violator of the Act. They must not only be [defined] but applied by the arbitrators without judicial instruction on the law. As their award may be made without explanation of their reasons and without a complete record of their proceedings, the arbitrators' conception of the legal meaning of such statutory requirements as "burden of proof," "reasonable care" or "material fact" cannot be examined.

Wilko v. Swan, 346 U.S. 427, 435-436 (1953).[16] While commercial arbitrators – who are not charged with a federal statutory duty – may possibly be required to follow the law, their interpretations of the law "are not subject,

---

15 (continued) claims were required] are quite as apt to produce incompatible or conflicting adjudications as are different rules of substantive law." *Garner v. Teamsters Union*, 346 U.S. 485, 490-491." *Vaca v. Sipes*, 386 U.S. 171, 179 (1967).

16 "Whether the arbitrators misconstrued a contract is not open to judicial review. . . . Arbitrators are not bound by the rules of evidence. . . . They may draw on their personal knowledge in making an award. . . . Absent agreement of the parties, a written transcript of the proceedings is unnecessary. . . . Swearing of witnesses may not be required. . . . And the arbitrators need not disclose the facts or reasons behind their award." *Bernhardt v. Polygraphic Co.*, 350 U.S. 198, 203 n. 4 & cases cited (1956). Accord: *Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 595, 598 (1960).

in the federal courts, to judicial review for error." 346 U.S. at 436 and authority cited. And contrary to Petitioner's contention (Br., pp. 13-14), it is by no means clear that labor arbitrators – who are charged with a special statutory duty to implement bargaining – are required to apply the FLSA, since they are confined to application of collective bargaining contracts and their construction of such contracts is all the parties have bargained for. 363 U.S. at 580-581, 597, 599. Even if they look to the FLSA "in determining the sense of the agreement," *Id.*, at 598, their application of it is unreviewable, especially since their "failure . . . to decide in accordance with the provisions of [the statute] . . . would need to be made clearly to appear." 346 U.S. at 436. And if the arbitrators' legal conclusions are so unreviewable, their factual findings are even more so, particularly in the absence of a record by which those findings could be evaluated.[17]

---

[17] In this sense Petitioner's reliance on *Collyer Insulated Wire Co.*, 192 N.L.R.B. No. 150, 77 L.R.R.M. 1931 (1971) (Br., pp. 10n. 1, 14) is misplaced, since the National Labor Relations Board may undertake plenary review of an arbitral decision and find its own facts if it concludes, in its discretion, that the result does not effectuate the purposes of the N.L.R.A. *E.g., Carey v. Westinghouse Corp.*, 375 U.S. 261, 272 (1964); *N.L.R.B. v. Acme Industrial Co.*, 385 U.S. 432, 436 (1967).

Moreover, that case involved a deferral to arbitration where the only statutory violation alleged was a refusal to bargain under §8(a)(5), 29 U.S.C. 158(a)(5), the contract contained an extremely broad arbitration clause and specifically provided for further bargaining on the disputed subject, and the parties had a long history of successful collective bargaining. 77 L.R.R.M. at 1932-34. It is extremely unlikely that such deference would have been shown if any substantive violation other than a refusal to bargain – which bargaining presumptively removes – was involved. See 77 L.R.R.M. at 1935-37; cf. 1939 (concurring opinion). As shown *supra*, pp. 13-14, promoting such bargaining is the prime purpose of the N.L.R.A.; but is utterly foreign to the purposes which the FLSA is designed to implement.

In short, "the remedy by arbitration, whatever its merits . . . substantially affects" a statutory claim because "the nature of the tribunal where suits are tried is an important part of the parcel of rights behind a cause of action," and "the change from a court of law to an arbitration panel may make a radical difference in ultimate result" due to the different standards of proof and judicial review involved. *Bernhardt v. Polygraphic Co.*, supra, 350 U.S. at 203. Thus an arbitrator here might simply have denied relief with no opinion, or found that "hours worked" in the contract was not meant to include on-call time. Under applicable principles, there is no basis for concluding that a reviewing court would reverse these results, much less that they are wrong. In other words, the employees' statutory FLSA rights would be subject to foreclosure by "the unreviewable discretion of the arbitrator." 400 U.S. at 365. Since an arbitrator under one contract may reach a completely different result from another arbitrator operating under the same, a separate or a successor contract, while courts acting absent arbitration provisions may reach still other results, requiring compulsory arbitration of FLSA claims would eviscerate the policy of nationwide uniformity which is central to the purposes of the Act. Cases *supra*, pp. 10, 13-14, 19. It was precisely this consideration which led Justice Harlan to conclude that where an important federal right is implicated "the presumption of comprehensiveness of the arbitral remedy is . . . rebutted" and the statutory remedies must remain available to vindicate statutory rights. 400 U.S. at 362.

Moreover, this Court has emphatically held that the Act's rights and remedies may not be altered by contractual agreement of an employer with either his employees or their union, absent statutory permission. *Brooklyn Saving*

Bank v. O'Neil, 324 U.S. 697 (1945); *Schulte v. Gangi*, 328 U.S. 108, 114-116 (1946).[18] And Congress both before and after these decisions has specified, in minute detail, the narrowly limited circumstances in which contractual agreement—and hence arbitration to effectuate and clarify such agreement, 363 U.S. at 580-581, 596-597—may be permitted to affect statutory rights. §§ 7(b)(1)(2), 7(e)(7), 7(f), 29 U.S.C. 207; Portal Act, §§ 4(a), (b), Supp. B, *infra*.[19] These carefully-drawn substantive

---

[18] Petitioner's misplaced reliance on *Walling v. Belo Corp.*, 316 U.S. 624 (1942) for the proposition that "agreements among the individuals affected" should be afforded "the fullest possible scope" (Br., p. 21) cannot diminish the force of these holdings. That case involved an individual employment contract which set a bona fide regular rate of pay—a basic condition of employment. The Court refused to overturn the contract because Congress left "regular rate" undefined and disallowance would thwart the beneficial purpose of assuring the employees a steady income, *Id*, at 316 U.S. 634-635; the opinion said nothing about contractual attempts to alter the rights to which the Act spoke or the remedies provided for enforcing them. Thus, far from supporting Petitioner's position, *Belo* is a persuasive argument for the judicial restraint vis-a-vis the statutory scheme which should be exercised here. See argument *supra*, pp. 21-22.

[19] Indeed, in enacting the Portal Act Congress specifically stated that lunch-time compensation could not be varied by contract. S. Rept. 37, 80th Cong., 1st Sess., p. 45 (1947).

provisions of course say nothing about altering *remedies* by contract; and if all the Act's provisions are subject to alteration via contractual agreements to arbitrate, these provisions are superfluous. This Court "has many times found state regulation of interstate commerce, when uniformity of its regulation is of national concern, to be incompatible with the Commerce Clause even though Congress has not legislated on the subject." *U.S. v. Darby, supra,* 312 U.S. at 119. That principle applies *a fortiori* when Congress has expressly spoken and the incompatible regulation is by private agreement responding to limited private interests.

III. EVEN IF THE POLICY FAVORING COMPULSORY ARBITRATION APPLIES TO SOME FEDERAL RIGHTS, ITS APPLICATION TO FLSA CLAIMS IS WHOLLY INAPPROPRIATE AND WOULD UNDERMINE COLLECTIVE BARGAINING THROUGH ARBITRATION INSTEAD OF PROMOTING IT.

Republic Steel Corp. v. Maddox has already been partially distinguished. *Supra,* pp. 13-15. It further rested on the fact that the remedy Maddox sought "did not differ from any that the grievance procedure had power to provide" and that exclusivity and finality of arbitral determination of contract claims were essential to arbitration's success. 379 U.S. at 653, 657; see also 400 U.S. at 360-363. And the *Bulk Carriers* dissent further rested on the assumption that arbitration offered a quicker remedy to effectuate the purpose of the seaman's act than "the attention of a federal district court which may be thousands of miles away." 400 U.S. at 375. But it is by no means certain that grievance-arbitration would be quicker then than the state-court suit here, since if the union delayed beyond

the applicable time limits (A. 29-31) or refused in good faith to carry the grievance higher, arbitration and the upper steps of the grievance procedure would never be reached. Even if that delay or refusal were in bad faith, the employee's burden in surmounting it is heavy. *Vaca v. Sipes, supra,* 386 U.S. at 185, 190-195; *Rubber Workers Local 12 v. N.L.R.B.*, 368 F.2d 12, 23 and cases cited (C.A. 5, 1966), cert. denied, 389 U.S. 837; cf. *O'Mara v. Erie-Lackawanna RR. Co.*, 407 F.2d 674, 678 (C.A. 2, 1969), affirmed sub nom *Czosek v. O'Mara*, 397 U.S. 25. (1970) (individual employees at serious disadvantage even in grievance procedures). And the quickness of arbitration is no benefit when the result is to foreclose statutory guarantees by virtue of the arbitrator's construction of the contract under which the dispute is submitted. *Supra,* pp. 24-25. Moreover, while an arbitrator might just possibly have applied "the law" to determine whether "hours worked" included on-call time, he would clearly be precluded from assessing the statutory remedy of liquidated damages, both because that remedy was meant to be subject to judicial determination only and because the contract prevented him from applying anything other than its specific terms. *Supra,* pp. 22-25. Thus, in addition to such substantive differences as evidentiary procedures and the judicial duty to justify results subject to review, *supra,* pp. 22-25, the grievance remedy would significantly have diverged from the statutory one.[20] As the *Maddox* court itself indicated in the

---

[20] That divergence becomes all the more obvious when it is realized that deferral of FLSA claims pending grievance-arbitration will threaten claimants' statutory remedies with irreparable harm. Since grievance-arbitration proceedings may well consume more than

(cont'd)

context of Railway Labor Act rights, such differences in "the scope of review from . . . awards, and the ability . . . to give the same remedies as could be obtained by court suit" preclude compulsory arbitration. 379 U.S. at 654-655, 657 & n. 14.[21]

In order "to fairly ensure [the statute's] effectiveness" by "the exercise of [prescribed] judicial discretion," *Wilko v. Swan, supra,* 346 U.S. at 437, appeal from the arbitrator's decision for purposes of enlarging his award to statutory bounds would therefore have to be permitted. But even such an appeal would not protect employees and

---

20 (cont'd) two years, *e.g., Vaca v. Sipes, supra,* 386 U.S. at 174-175, each week of unpaid compensation is a separate cause of action under the FLSA, §7(a)(1), Portal Act, §6(a), *infra,* and suits filed more than two years after accrual of cause of action are absolutely barred, Portal Act §§6, 7, Supp. B, *infra,* the damages to which such claimants are entitled will be progressively eroded the longer, beyond two years, those procedures take. Where potential claimants leave the noncomplying employer's employ a significant times before suit is filed (Cf. Pet. Br., p. 21), such erosion will be aggravated, since the "beginning" part of the withheld compensation will not be replaced by an equal "end" segment. Even if §16(b) claimants and their private counsel know enough to file a court suit simultaneously with their grievances in order to toll the statute of limitations, but see 111 Cong. Rec. 10794, 89th Cong., 1st Sess. (1965) (explanations of Senator McNamara), their statutory rights may be foreclosed by adverse or nonexistent arbitral fact determinations. *Supra,* pp. 20, 22-25.

21 The argument for preclusion is even stronger here because *Maddox* involved only a standard monetary award, *Id.,* while complete arbitral decisions here would necessarily have involved such complex legal determinations as whether the employer was acting in "good faith" on "reasonable grounds" to believe he had not violated the Act and applicable case law. *Supra,* pp. 23-25.

complying employers from extraevidentiary fact determinations made by arbitrators who are usually not lawyers, and to preserve the Act's policy of nationwide uniformity, *supra*, pp. 13-14, 19, 25, review of arbitral fact-finding – necessarily a review *de novo* where no transcript or opinion was entered – would have to be permitted as well.[22] Both types of review entail the splitting of a cause of action – a result this Court has repeatedly characterized as the worst of all possible solutions, and which is particularly inappropriate where, as here, the "essence of the legislative policy . . . is ensuring promptness in the payment of wages." 400 U.S. at 366. Accord: *Vaca v. Sipes, supra*, 386 U.S. at 185-188; *NLRB v. C & C Plywood Corp.*, 385 U.S. 421, 429-430 (1967); *Carey v. Westinghouse Corp.*, 375 U.S. 261 (1964). And in either case arbitral finality and exclusivity would unavoidably be undercut. But as both the concurring and dissenting opinions in *Bulk Carriers* recognized, the whole point of requiring arbitration of disputes is arbitration's finality and exclusivity, since only then can the employer limit the modes of redress against him and the parties "establish a uniform and exclusive method for orderly settlement of employee grievances." *Republic Steel Corp. v. Maddox, supra*, 379 U.S. 653, 656; 400 U.S. at 360, 362-363, 372-373 & n. 8, 374-377. As Justice Harlan noted, if arbitration cannot be made

---

[22] Indeed, grave constitutional questions of due process and equal protection would be presented if such review in depth were not permitted merely because some employees were fortuituously covered by a collective bargaining contract affording grievance-arbitration, while others were not so covered and could secure review of factual and legal determinations in court.

final, there is little incentive for parties to include grievance-arbitration in their collective-bargaining contracts. 400 U.S. at 360, 362; 379 U.S. at 653. If arbitration cannot be made final, it merely adds another useless layer to the existing judicial structure for determining disputes, for parties will seek relief in the forum which can fully protect both rights and remedies in a single, less time-consuming proceeding, and this Court's "pro-arbitration policy," 400 U.S. at 360, will be *de facto* reversed. As shown *supra*, whatever the finality of grievance-arbitration vis-a-vis purely compensatory and essentially private statutory rights, such finality cannot be obtained except by sacrificing a prime Congressional purpose where FLSA claims are involved.[23]

---

[23] Petitioner's reliance (Br., pp. 13-14, 18-19) on cases cited for the proposition that arbitration of FLSA claims was required even under the U.S. Arbitration Act of 1925 (Supp. C, *infra*) is as misplaced as its other citations. First, those cases all rested on the ground that Congessional silence in the FLSA regarding "agreement between the parties for any other method of settlement" than court suit permitted such agreement. *Donahue v. Susquehanna Collieries Co.*, 138 F.2d 3, 6 (C.A. 3, 1943); *Watkins v. Hudson Coal Co.*, 151 F.2d 311, 320 (C.A. 3, 1945), cert. denied, 327 U.S. 777, 816; *Evans v. Hudson Coal Co.*, 165 F.2d 970, 973 (C.A. 3, 1948); *Beckley v. Teyssier*, 332 F.2d 495, 496-497 (C.A. 9, 1964). That position has been explicitly rejected by this Court. *Brooklyn Savings Bank v. O'Neil*, 324 U.S. 697, 713 (1945); *Schulte v. Gangi*, 328 U.S. 108 (1946).

Second, *Beckley v. Teyssier* remitted to arbitration a claim for preliminary travel time which the Portal-to-Portal Act of 1947 had specifically made subject to contract determination, hence to arbitration under the contract. 332 F.2d at 496; Portal Act, §§ 4(a), (b), Supp. B *infra*. No conflict with the statutory purpose

(cont'd)

In the *Steelworkers Trilogy* the Court distinguished *Wilko v. Swan, supra*, because "In the commercial case, arbitration is the substitute for litigation. Here, arbitration is the substitute for industrial strife." 363 U.S. at 578. But where a statutory right is involved, litigation rather than strife will similarly ensue, and peaceful dispute-settlement is furthered by the fact that complete and calculable relief is afforded in a single action, free of possible union interference where the employees' interests and those of their representative diverge. While this Court in

---

23 (cont'd) was therefore presented; and insofar as that case may be read as willing to extend compulsory arbitration to all FLSA claims, it seems clearly erroneous in light of *Brooklyn Savings Bank* and *Schulte v. Gangi*, which were apparently not brought to the court's attention by private counsel there involved.

Next, the Third Circuit cases rested on a construction of the Arbitration Act as embracing contracts of employment – a position which this Court subsequently rejected as well. *Textile Workers v. Lincoln Mills of Ala.*, 353 U.S. 448, 466 (1957) (by implication); *Bernhardt v. Polygraphic Co.*, 350 U.S. 198, 201 n. 3 (1956). Indeed, the *Donahue* case, on which *Beckley v. Teyssier* and the other Third Circuit cases relied, did not even consider the express exception for "contracts of employment of seamen, railroad employees, or any other class of workers engaged in . . . interstate commerce" which headed that Act. 11, Supp. C *infra*. Moreover, in adopting this position the Third Circuit conflicted with both its own decisions and the position of every other circuit which passed on the issue. *Motor Coach Employees v. Penna. Greyhound Lines*, 192 F.2d 310, 313 (C.A. 3, 1951); *Penna. Greyhound Lines v. Motor Coach Employees*, 193 F.2d 327, 328 (C.A. 3, 1952); *Gatliff Coal Co. v. Cox*, 142 F.2d 876, 882 (C.A. 6, 1944); *Furniture Workers v. Colonial Hardwood Flooring Co.*, 168 F.2d 33, 35-37 (C.A. 6, 1948); *Shirley-Herman Co. v. Hod Carriers*, 182 F.2d 806, 808 (C.A. 2, 1950); *Mercury Oil Refining Co. v. Oil Workers*, 187 F.2d 980, 983 (C.A.

(con'td)

dicta has occasionally indicated that compulsory arbitration might apply to statutory rights, *e.g., Wilko v. Swan, supra,* 346 U.S. at 431-432; 400 U.S. at 366, the proof of the pudding is in the eating, and the Court has never once held statutory rights subject to remedial alteration, either by contract, bargaining or arbitration, in any case in which the issue was squarely presented. *Brooklyn Savings Bank v. O'Neil, supra; Schulte v. Gangi, supra; Wilko v. Swan, supra; Bernhardt v. Polygraphic Co., supra; U.S. Bulk Carriers v. Arguelles, supra.*

If it is desirable that FLSA claims be subject to compulsory arbitration, at this late date such compulsion is for Congress and not this Court to provide. The answer to Petitioner's contentions is foreshadowed by the fact that Congress has remained silent with respect to requiring such arbitration for all the 25 years since it in §301 "brought the arbitration policy to the forefront" (Pet. Br., p. 15).

---

[23] (cont'd) 10, 1951); *Electrical Workers v. Miller Metal Prods.*, 215 F.2d 221, 224 (C.A. 4, 1954); *Lincoln Mills of Ala. v. Textile Workers*, 230 F.2d 81, 85-87 (C.A. 5, 1956), rev'd on another point, 353 U.S. 448; *Steelworkers v. Galland-Henning Mfg. Co.*, 241 F.2d 323, 326-327 (C.A. 7, 1957). For the tangle to which this conflict led, see the majority and dissenting opinions in *Tenney Engineering Co. v. Electrical Workers Local 437*, 207 F.2d 450, 455 (C.A. 3, 1953). The Court ultimately rejected the Third Circuit's attempt to reconcile these cases as well. Cf. *Tenney, supra*, with *Bernhardt v. Polygraphic Co., supra*, 350 U.S. at 200-201.

Finally, any vitality the basic Third Circuit cases may have possessed was sapped by the 1947 enactment of the Portal-to-Portal Act, which despite those decisions specifically reaffirmed the narrow bounds within which contractual agreement was permitted to modify FLSA rights and remedies. §§3(a), 4(a)(b), Supp. B., *infra*. And it should be noted that despite its remittals to arbitration under an

(cont'd)

CONCLUSION

For the above reasons the decision of the court below was correct in all respects, and should be affirmed.

Respectfully submitted,

RAYMOND EDWARD FRANCK
Raun & Franck
Counsel for Respondents
203 N. Main
Denison, Iowa 51442

---

[23] (cont'd) extremely broad arbitration clause, e.g., 138 F.2d at 4, n. 1, the Third Circuit carefully decided all relevant substantive issues under the FLSA, and remitted to arbitration only calculation of the amount of money due. *E.g., Watkins v. Hudson Coal Co., supra*, 151 F.2d at 313-320; *Evans v. Hudson Coal Co., supra*, 165 F.2d at 973-974; see *Wilko v. Swan*, 346 U.S. 427, 432 n. 13, 435 (1953) (same reading). If arbitration even under a broad clause must be confined to such ministerial functions where statutory rights are involved – as the Third Circuit clearly thought despite its pro-arbitration policy – then suit to determine the legal issues must necessarily be brought prior to arbitration, and the parties to a collective-bargaining contract will be unable to achieve exclusivity in any event.

APPENDIX

SUPPLEMENT A

FAIR LABOR STANDARDS ACT OF 1938, AS AMENDED, 29 U.S.C. 201 *ET SEQ.*

§ 2(a) . . . . the existence, in industries engaged in commerce or in the production of goods for commerce, of labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers (1) causes commerce . . . to be used to spread and perpetuate such labor conditions among the workers of the several States; . . . (3) constitutes an unfair method of competition in commerce; (4) leads to labor disputes burdening and obstructing . . . the free flow of goods in commerce; and (5) interferes with the orderly and fair marketing of goods in commerce.

(b) It is . . . the policy of this Act, through the exercise by Congress of its power to regulate commerce . . . to correct and as rapidly as practicable to eliminate the conditions above referred to . . .

* * * * *

§ 3(o) Hours worked — In determining for the purposes of sections [6] and [7] the hours for which an employee is employed, there shall be excluded any time spent in changing clothes or washing at the beginning or end of each workday which was excluded from measured working time during the week involved by the express terms of or . . . practice under a bona fide collective-bargaining agreement applicable to the particular employee. . . .

* * * * *

§ 7(a)(1) Except as otherwise provided in this section, no employer shall employ any of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, for a workweek longer than forty hours, unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

* * * * *

§ 16(b) Any employer who violates the provisions of section [6] or . . . [7] of this act shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation. . . and in an additional equal amount as liquidated damages. Action to recover such liability may be maintained in any court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated. No employee shall be a party plaintiff to any such action unless he gives his consent in writing . . . and such consent is filed in the court in which such action is brought. The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action. The right provided by this subsection to bring an action . . . and the right of any employee to become a party plaintiff to any such action, shall terminate upon the filing of a complaint by the Secretary of Labor in an action under section 217 in which restraint is sought of any further delay in the payment of unpaid minimum

wages, or the amount of unpaid overtime compensation. . . owing to such employee . . .

* * * * *

SUPPLEMENT B

PORTAL-TO-PORTAL ACT OF 1947, 29 U.S.C. 251 *ET SEQ.*

* * * * *

§(4) . . . . (a) Except as provided in subsection (b) of this section, no employer shall be subject to any liability. . . under the Fair Labor Standards Act. . . on account of the failure of such employer to pay an employee minimum wages, or . . . overtime compensation, for or on account of any of the following activities engaged in on or after May 14, 1947 –

(1) walking, riding or traveling to and from the actual place or performance of the principal activity or activities which such employee is employed to perform, and

(2) activities which are preliminary to or postliminary to said principal activity or activities, which occur either prior to the time . . . at which such employee commences, or subsequent to the time . . . at which he ceases, such principal activity or activities.

(b) Notwithstanding . . . subsection (a) . . . the employer shall not be so relieved if such activity is compensable by either –

(1) an express provision of a written or nonwritten contract in effect, at the time of such activity, between

such employee, his agent, or collective-bargaining representative and his employer; or

(2) a custom or practice in effect, at the time of such activity, at the establishment or other place where such employee is employed, covering such activity, not inconsistent with a written or nonwritten contract, in effect at the time of such activity, between such employee, his agent, or collective-bargaining representative and his employer.

* * * * *

§6 . . . . Any action commenced on or after May 14, 1947 to enforce any cause of action . . . under the Fair Labor Standards Act . . . –

(a) if the cause of action accrues on or after May 14, 1947 – may be commenced within two years after the cause of action accrued, and every such action shall be forever barred unless commenced within two years after the cause of action accrued, except that a cause of action arising out of a willful violation may be commenced within three years after the cause of action accrued. . .

* * * * *

§7 . . . . an action is commenced for the purposes of section 6 . . . on the date when the complaint is filed; except that in the case of a collective or class action instituted under the Fair Labor Standards Act . . . it shall be considered to be commenced in the case of any individual claimant . . .

(a) on the date when the complaint is filed, if he is specifically named as a party plaintiff . . . and his written consent . . . is filed on such date in the court in which the action is brought; or

(b) if such written consent was not so filed . . . — on the subsequent date on which such written consent is filed in the court in which the action was commenced.

* * * * *

§ 10 . . . . (a) In any action or proceeding based on any act or omission on or after May 14, 1947, no employer shall be subject to any liability . . . if he pleads and proves that the act or omission complained of was in good faith in conformity with and in reliance on any written admistrative regulation, order, ruling, approval, or interpretation . . . .

* * * * *

§ 11. . . . In any action commenced . . . on or after May 14, 1947 to recover unpaid minimum wages, unpaid overtime compensation, or liquidated damages . . . if the employer shows to the satisfaction of the court that the act or omission giving rise to such action was in good faith and that he had reasonable grounds for believing that his act or omission was not a violation of the Fair Labor Standards Act . . . the court may, in its sound discretion, award no liquidated damages or award any amount thereof not to exceed the amount specified in section 216 (b) of this title.

SUPPLEMENT C

U.S. ARBITRATION ACT OF 1925, 9 U.S.C. 1 *ET SEQ.*

§ 1. *"Maritime transactions" and "commerce" defined; exceptions to operation of title.* "Maritime transactions," as herein defined, means charter parties, bills of lading of water carriers, agreements relating to wharfage, supplies

furnished vessels or repairs to vessels, collisions, . . .; "commerce," as herein defined, means commerce among the several States or with foreign nations . . . but nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.

§ 2. *Validity, irrevocability, and enforcement of agreements to arbitrate.* A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction . . . shall be valid, irrevocable, and enforceable. . . .

§ 3. *Stay of proceedings where issue therein referable to arbitration.* If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit . . . is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial . . . until such arbitration has been had . . . .

§ 4. . . . A party aggrieved by the alleged failure . . . of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under Title 28 . . . of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed . . . The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, . . . shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement.

* * * * *